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filed 12/23/10

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.: 2008-1429A

JOHN DaROSA, JOHN DAY, DIANE COSMO, LUIS BARBOSA and ERMELINDA BARBOSA,
Plaintiffs,

v.

CITY OF NEW BEDFORD,
Defendant and Third-Party Plaintiff,

v.

MONSANTO COMPANY, PHARMACIA CORPORATION, SOLUTIA, INC., CORNELL-DUBILIER ELECTRONICS, INC., AVX CORPORATION, NSTAR ELECTRIC COMPANY, NSTAR GAS COMPANY, TUTOR PERINI CORPORATION AND ABC DISPOSAL SERVICES, INC.,
and John Does 1 - 20,
Third-Party Defendants.

MEMORANDUM OF DECISION ON MOTIONS TO DISMISS PURSUANT TO MASS. R. CIV. P. 12(b)(6) FILED BY DEFENDANTS, MONSANTO COMPANY (#49), SOLUTIA, INC. (#50), PHARMACIA CORPORATION (#51), CORNELL-DUBILIER ELECTRONICS, INC. (#48), AVX CORPORATION (#55), NSTAR ELECTRIC COMPANY AND NSTAR GAS COMPANY (#60), TUTOR PERINI CORPORATION (#41) AND ABC DISPOSAL SERVICES, INC. (#54)

The present action was filed by the plaintiffs, John DaRosa, John Day, Diane Cosmo, Luis Barbosa and Ermelinda Barbosa, hereinafter referred to as the "property owners," as owners of certain residences situated within the City of New Bedford (the "City"). The property owners have named the City as a defendant claiming that on or about April 25, 2005, the property owners received notice from the City that it had conducted an environmental assessment on nearby McCoy Field and on city owned portions of Ruggles and Greenwood Streets in New Bedford and identified the presence of contaminated fills

from dumping activities at the city landfill and requesting access to the property owners' premises to conduct sampling. The sampling occurred on or about December 15, 2005. They allege that the sampling confirmed that the soil on their property was contaminated with various hazardous substances, including PCBs. The property owners assert multiple theories of recovery claiming that the City used the site of the property owners' premises as a dumping ground for hazardous waste. The property owners filed a first amended complaint on March 4, 2009, limiting their claims to the theories of private nuisance, public nuisance, a violation of G.L. c. 21E, § 5, and breach of a contract to remediate.

In the City's answer to the property owners' first amended complaint, the City admits discovering soil contamination on the former McCoy Field during the construction of the Keith Middle School and the subsequent identification of contaminated fill during the building of the Keith Middle School and admits that soil borings were taken in the neighborhood on land abutting that of the property owners. The City further admitted that soil sampling performed in December 2005 at the property owners' premises revealed the presence of arsenic, lead and PCBs and other hazardous materials on some of the properties but deny that the soil on the plaintiffs' property is "contaminated."

On December 10, 2009, the City filed its third party complaint. The corporate defendants named in such third party complaint include Monsanto Company, Pharmacia Corporation, Solutia, Inc. and Cornell-Dubilier Electronics, Inc. Also named are various individuals.

On March 1, 2010, the City filed an amended third party complaint naming all of the third party defendants referenced in this motion; all of whom have filed motions under Mass. R. Civ. P. 12(b)(6), seeking to dismiss the third party complaints against them.

The matter was heard on September 8, 2010 and taken under advisement.

DISCUSSION

The Third-Party Complaint

The City has filed a twenty-six page third party complaint stating that the City has been sued by the property owners " . . . relative to the City of New Bedford's alleged operation of a former ash dump in the vicinity of McCoy Field and Keith Middle School in New Bedford at a site now known as DEP Release Tracking Number 4-15685, and sometimes referred to as the "Parker Street Waste Site" (the "site"). It is further claimed that the plaintiffs have alleged that as a result of the operation of the site their residential properties have become contaminated with hazardous waste materials. The City alleges that Monsanto Company ("Monsanto") is a successor corporation to an entity referenced as the "old" Monsanto. It is further alleged that there are certain indemnification agreements in effect which create liability in Pharmacia Corporation ("Pharmacia") and Solutia, Inc. ("Solutia") in connection with the liabilities of Monsanto.[1] The City alleges that the "Old Monsanto" was the sole distributor of polychlorinated biphenyls (PCBs) in the United States. The City asserts that from as early as the 1930's, Old Monsanto was aware that PCBs are toxic.

Also named in the third party complaint is Cornell-Dubilier Electronics, Inc. ("CDE") and AVX Corporation ("AVX"). It is alleged that CDE manufactured and distributed capacitors and operated an incinerator at their site. It is claimed that they disposed of waste from such incinerator which included metals, PCBs and other contaminants which

[1] All of the aforesaid defendants challenge such allegation, however, the matter of successor in liability is not the subject of the pending motion.

were transported to the site. It is further alleged that AVX manufactured and distributed capacitors and disposed of waste containing PCBs and other hazardous materials which were transported to the site.

The City alleges that a predecessor corporation to NSTAR Gas and Electric had burned certain fuels which generated coal ash and certain metals. It is further claimed that it used PCBs in its transformers, capacitors and gas operations and that New Bedford Gas arranged for others to transport the ash and other wastes, which included PCBs, to the site.

ABC Disposal Services, Inc. ("ABC") is alleged to have been hired by industrial companies including AVX and CDE to transport the waste, including those at issue which are claimed to have been transported to the site.

The City has also asserted claims against Tutor Perini Corporation ("Tutor Perini") which is alleged to have built New Bedford High School in approximately 1972. The City claims that certain building materials and products which contain PCBs including window and door sealant caulking, paint mastic and heating, ventilation and air conditioning components contain such items. It is alleged that as a result of the presence of such PCB contaminated materials, the environment in and around the high school was also contaminated by PCBs. It is claimed that such PCBs were released into the air and/or deposited in the environment at the site, including without limitation, within the HVAC system at the high school.

It is further alleged that Tutor Perini, during construction of the high school, conducted excavation and grading activities which involved the relocation of excavated materials containing metals, PCBs and other materials from one portion to another portion

of the high school property and to adjacent properties, all of which are part of the site.

The third party complaint asserts various theories of liability against the various third party defendants (Monsanto, Pharmacia and Solutia will be hereinafter collectively referred to as the "Monsanto Companies"). The third party complaint alleges that the Monsanto Companies, CDE and AVX are liable under a "products liability" theory and in negligence. It is alleged that all of the third party defendants are liable under G.L. c. 93A and G.L. c. 21E.

THE LEGAL STANDARD

In Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008), the Supreme Judicial Court set forth a new standard in connection with the adequacy of complaints. The court followed the standard set by the United States Supreme Court in Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007), which concluded that "[w]hile a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . " based on the assumption that all of the allegations in the complaint are true. The " . . . allegations plausibly suggesting (not merely consistent with) an entitlement to relief in order to reflect the threshold requirement . . . that the 'plain statement' possessed enough heft to show that the pleader is entitled to relief." Id. at 1966.

The City's Products Liability Claims Against the Monsanto Companies, CDE and AVX

The City has alleged product liability claims against the above referenced defendants alleging design defects and a failure to warn relating to the risks associated

with PCBs.

The City acknowledges that the subject claim constitutes a claim for breach of implied warranties. Back v. Wickes Corp., 375 Mass. 633, 640 (1978). See also Guzman v. MRM/Elgin; Wilcox & Gibbs, Inc., 409 Mass. 563, 569 (1991).

The Monsanto Companies argue that any PCBs manufactured by them were deposited at the site no later than 1972 and that hence, any injury and damage occurred at that time. They further argue that due to the fact that lack of privity was a defense until the amendment of G.L. c. 106, § 2-318, in 1973, the City is barred from maintaining its action. Such statute provides in part:

> "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods . . . . All actions under this section shall be commenced within three years next after the date the injury and damage occurs."

The issue of retroactivity of the 1973 amendment to § 2-318 was addressed in Hoffman v. Howmedica, Inc., 373 Mass. 32, 36 (1977), where the court stated:

> "The elimination of the privity requirement accomplished by Section 2-318 has as its evident purpose deemphasizing the 'sale' transaction and looks instead to the harm which may result from defects contained in items in commerce which may cause injury to the class of plaintiffs specified in the statute. . . . Viewed in this light, Section 2-318 does not operate retroactively but prospectively in the sense that it affords protection to a proper plaintiff whose injury came about after the effective date of the amendment."

Our courts have continued to look toward the "date of injury" rather than the date of transaction in determining the lack of privity defense is available against a plaintiff where injuries occurred after the effective date of the amendment. Thayer v. Pittsburgh-Corning

Corp., 45 Mass. App. Ct. 435, 439 (1998) and cases cited. The court in Thayer noted that federal precedent has concluded that the defense of lack of privity is not available against a plaintiff whose first manifestation of physical symptoms attributable to an asbestos related disease occurred after December 16, 1973. Id.

In the context of an injury to property, the court in Cameo Curtains, Inc. v. Phillip Carey Corp.; Universal Roofing and Sheet Metal Co., Inc., 11 Mass. App. Ct. 423, 425-426 (1981), the court noted in construing the language of Section 2-318, that the language "after the date the injury and damage occurs," extended both the beginning of the limitations period from the time when the injury was first received to the time when the damage flowing from the injury can be fairly estimated.

A review of the City's third party complaint could be construed as a claim that injury and harm occurred at some point in time after the depositing of the PCBs and other materials at the site. In particular, there is reference to the migration of PCBs from building materials into the atmosphere and onto other locations within the high school building and without. The court thus concludes that the complaint sufficiently sets forth a claim for relief even absent the allegation of privity with the Monsanto Companies.

AVX and CDE each argue that the City's so-called product liability/warranty claims must fail because the alleged disposal of waste does not give rise to a products liability claim. These defendants are not denying that they fit within the scope of the law of warranty in Massachusetts which has been described as being congruent in nearly all respects with the principles expressed in the Restatement (2nd) of Torts, § 402A (1965), with liability for breach of warranty being limited to the manufacturer, seller, lessor or supplier of goods. Guzman v. MRM/Elgin; Wilcox & Gibbs, Inc., 409 Mass. 563, 569

(1991).

For the purposes of the subject motion to dismiss AVX and CDE are not denying that at some point in time they were a manufacturer, seller, or supplier of capacitors.

While a disposal site for such matters would certainly not be considered to constitute an entity that might reasonably be expected to use or consume such items under G.L. c. 106, § 2-318, they certainly could be construed as being "affected by the goods" within the meaning of the statute. The motions to dismiss must therefore be denied insofar as they assert a so-called products liability/warranty claim.

The Monsanto Companies, CDE and AVX allege that the City's negligence claims are barred by G.L. c. 260, §2A.

The provisions of G.L. c. 260, § 2A, provide:

> Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

The third party defendants argue that since the City, in its answer to the property owners' amended complaint, has admitted that in April 2005, it discovered contamination on McCoy Field during the construction of the Keith Middle School. They refer to test borings performed on the site which confirmed the presence of contaminants in December of 2005, thus purportedly putting them on notice of their claims against the third party defendants. In that the present third party action was not filed until December 10, 2009, they assert that any claim for negligence against them brought after December 10, 2006 is time barred.

The City argues in its opposition that while it may have been aware of the existence of contaminants, it was not aware of the identity of those responsible for their existence

until shortly before the filing of the subject third party action.

In applying G.L. c. 260, § 2A, our courts have adopted the so-called "discovery rule" that tolls a statute of limitations until a plaintiff knows or reasonably should have known that it has been harmed or may have been harmed by the defendant's conduct. Taygeta Corp. v. Varian Assocs., Inc., 436 Mass. 217, 229 (2002).

The Taygeta case is particularly helpful in analyzing the circumstances of the present action. The court in Taygeta noted that in most instances the question of whether a plaintiff knew or should have known of its cause of action is one of fact that will be decided by the trier of fact with the appropriate standard being, when assessing the knowledge or notice, as that of a reasonable person in the plaintiff's position. Id. at 229, citing Riley v. Presnell, 409 Mass. 239, 243 (1991). In Taygeta the party allegedly responsible party for contamination had raised various issues over a considerable period of time as to the scope its responsibility and the extent of contamination on the subject property. The court concluded that their was a genuine issue of material fact as to whether a reasonable person in the plaintiff's position knew or should have known that it had been harmed by the defendant's conduct.

CDE and AVX further argue that the City has not set forth a claim which would establish a breach of a duty by them in connection with the City's negligence claim. A manufacturer or the person owning or controlling a thing which is dangerous by its nature or is in a dangerous condition either to its knowledge or as a result of its want of reasonable care in manufacture or inspection or who deals with or disposes of that thing in a way that he foresees, or in the exercise of reasonable care ought to foresee probably will carry it into contact with some person, known or unknown, who will probably be

ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him. Carter v. Yardley & Co. Ltd., 319 Mass. 92, 96 (1946).

Based upon the aforesaid principle, the City's claim for negligence sufficiently sets forth a claim for relief against the third party defendants.

All Defendants Have Moved to Dismiss the City's Claims Under G.L. c. 93A (against all defendants)

All of the third party defendants argue that the plaintiff's claim under G.L. c. 93A, must be dismissed by virtue of the failure of the City to allege that it caused a timely demand for relief to be served pursuant to G.L. c. 93A, § 9. Such a demand letter is a prerequisite to suit under said section and must be alleged and proved. York v. Sullivan, 369 Mass. 157, 163 (1975); Kanamaru v. Holyoke Mut. Ins. Co., 72 Mass. App. Ct. 396, 407-408 (2008). In the complaint, the City has failed to allege the sending of such a demand for relief, however, it is not specified in its complaint whether it is proceeding under G.L. c. 93A, § 9 or G.L. c. 93A, § 11. The third party defendants counter that the complaint fails to sufficiently set forth sufficient allegations that the City was involved in a trade or business in connection with the subject transaction. In construing the complaint as a whole, the court could infer that the City received materials at its landfill and that the receipt thereof from commercial entities such as ABC was in a commercial context. Whether a municipality is acting in a business context depends on the nature of the transaction, the character of the parties involved and their activities and whether the transaction was motivated for business reasons. Park Towing, Inc. v. City of Revere, 442 Mass. 80, 85 (2004). The court concludes that this issue would be best be left for summary judgment or trial.

The third party defendants further allege that there are sufficient allegations in the complaint to set forth an unfair or deceptive practice within the meaning of G.L. c. 93A. The gist of plaintiff's claims against each of the third party defendants is that their liability with respect to sharing in the responsibility for an appropriate remedial action under G.L. c. 21E was clear and that they have wrongfully refused to honor their obligations under such statute after being provided with a reasonable opportunity to do so. While it appears the City's claims are somewhat tailored after the provisions of G.L. c. 176D, § 3, which relates to unfair claim settlement practices by insurers which, in certain instances are per se violations of G.L. c. 93A, the failure to acknowledge responsibility under G.L. c. 21E, is not necessarily a violation of G.L. c. 93A. Obviously, the facts relating to this matter require further development, however, they are sufficiently plead at this time to withstand a motion to dismiss.

The Defendants Move to Dismiss the City's Claims Under G.L. c. 21E

All of the third-party defendants have asserted that the City's claims under G.L. c. 21E should be dismissed for failure of the City to comply with the notice and demand procedure set forth in § 4A(a) and (b), prior to commencing litigation. The City contends that it was not required to follow these procedures in light of the exception contained in G.L. c. 21E, § 4A(c), that provides:

> "Notwithstanding any other provisions of section four or four A, a person who is joined as a party in any civil action may, but shall not be required to, carry out the procedures described in subsections (a) and (b), above, prior to filing a third-party claim, cross-claim or counterclaim seeking relief pursuant to section four or four A . . . "

In fact, the City initiated such procedures and then filed suit without completing the same. An issue raised by the defendants is whether or not the scope of the proposed

response action is far beyond that action mandated by the initial claim filed by the property owners. Factual issues of that sort cannot be resolved by a review of the present complaint. The court concludes that the dismissal of this action is not the proper vehicle for addressing this issue which is best left to any named third party defendant to potentially seek to stay the proceeding pending pursuit of the procedures outlined in the statute.

The Monsanto Companies argue that they are not "persons liable under G.L. c. 21E, § 5," which lists as persons responsible: (1) the owner or operator of a vessel or site from which there has been a release or threat of release; (2) any person who at the time of storage or disposal of hazardous materials owned or operated any site upon which the hazardous materials was stored or disposed and from which there is or has been a release or threat of release; (3) any person who by contract, agreement or otherwise, directly or indirectly, arranged for the transport, disposal, storage or treatment of hazardous material to or in a site or vessel from which there is or has been a release or threat of release of hazardous materials; (4) any person who directly or indirectly transported any hazardous material to transport, dispose of, storage or treatment vessels or sites from which there is or has been a release or threat of release of such material; and (5) any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or site. The City argues that the Monsanto Companies constitute a person liable under § 5, who otherwise caused or is legally responsible for a release of hazardous material from a site. There are various allegations in the third party complaint which would support a claim, albeit tenuous, of liability for the release which is the subject of this action. The viability of such a claim is best left to summary judgment.

Claims Against Tutor Perini

Tutor Perini has alleged that the City's claims against it are barred by G.L. c. 260, § 2B, which provides that actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property shall be commenced within three years after the cause of action accrues, " . . . provided however that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner." The City's claims against Tutor Perini are based upon two factual scenarios. The first relates to the use of materials on the site including certain caulking which purportedly contained PCBs which have somehow been released into the building, including the HVAC system. The second claim relates to excavation work done by Tutor Perini during construction wherein it is alleged that some contaminated material was removed from one part of the site to another.

Tutor Perini directs the court to G.L. c. 21E, § 2, defining "disposal site" which provides in part, "[t]he term shall not include any site containing . . . building materials still serving their original intended use or emanating from such use . . . ." The court concludes that the materials which the City alleges Tutor Perini installed incidental to the construction of this high school fit within the aforesaid exception and hence, the City's claims must be dismissed. The court concurs and notes that if the City were correct in its contention, every building in which any contractor has installed asbestos or similar materials would subject said contractor to liability for an unlimited period of time. Furthermore, the court finds that both the City's G.L. c. 93A claim and claim under G.L. c. 21E, as against Tutor Perini, is essentially sounding in tort. Oliveira v. Pereira, 414 Mass. 66, 73 (1992).

Both parties concede that there are no appellate cases determining whether the provisions of G.L. c. 260, § 2B, would apply to a claim under G.L. c. 21E. There are two Superior Court decisions that are split on the issue. The court concurs with the reasoning of the judge in the case of White v. Superior Oil, Inc., 205 Mass. Super. LEXIS 690 (June 9, 1995). Our courts have noted that § 2B, while phrased in language similar to a statute of limitations, has the effect of abolishing the remedy and not merely barring the action. Klein v. Catalano, 386 Mass. 701, 702-703 n.3 (1982). Our courts have further noted that the bar of a statute of repose is absolute while the bar of a statute of limitations is conditional and has thus precluded the application of the "relation back" doctrine in connection with the statute of repose. Tindol v. Boston Housing Auth., 396 Mass. 515, 519 (1986), citing James Ferrera & Sons v. Samuels, 21 Mass. App. Ct. 170 (1985).

The court thus concludes that the claims against Tutor Perini are barred by the statute of repose, including the claim under G.L. c. 93A, which is derivative of the 21E claim.

CONCLUSION

The court notes that many of the theories plead in this action may very well be tenuous and fall by the wayside as discovery progresses and the matter proceeds to hearing on summary judgment. It is **ORDERED** that, with the exception of the motion to dismiss of Tutor Perini which is **ALLOWED**, the motions to dismiss of the remaining third party defendants are hereby **DENIED** without prejudice to being renewed after an appropriate factual record is developed in this case.

By the Court,

Richard T. Moses
Justice of the Superior Court

DATED: December 23, 2010